OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-17-005

Re: Health PEI

April 21, 2017

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary: An applicant sought a review of a decision about a request for access to a report of a systemic review at the Queen Elizabeth Hospital. The Public Body refused the Applicant access to the record on the basis that it is quality improvement information. Section 30 of the *Health Services Act* says no person has a right of access to quality improvement information. The issue in this interim order is whether section 53 of the *FOIPP Act* gives the Commissioner the power to examine the record to assess whether it is quality improvement information. The Commissioner determined that she has the authority to examine the responsive record and orders Health PEI to produce a copy of this record to her.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 2, 5, 6, 53, *Health Services Act*, RSPEI 1988, c. H-1.6, ss. 26(c) to (g), 28, 29, and 30 , *Interpretation Act,* RSPEI 1988, c. I-8, s. 24(2), *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, section 44

Decisions Considered: Order R1-15-002 *Re Health PEI* (PE IPC) [http://www.assembly.pe.ca/index.php3?number=1046748]

Ontario (Ministry of Health) v. Big Canoe, [1994] O.J. No. 4609 (Div. Ct.), or Toronto Doc. 111/94 (Div. Ct.)

Ontario (Ministry of Health) v. Big Canoe, 1995 CanLII 512 (ON CA), 1995 CarswellOnt 3311 (ONCA), and 1995 O.J. 1277 (C.A.)

Re Ministry of Health, Ontario IPC Interim Order P-623

British Columbia (Information and Privacy Commissioner) v. *British Columbia (Police Complaint Commissioner),* 2015 BCSC 1538 (CanLII)

University of Calgary v *R(J),* 2015 ABCA 118 (CanLII), and 2016 SCC 53 (CanLII)

Other resources Cited: Prince Edward Island, Legislative Assembly, *Hansard*, 63rd Leg, 3rd Sess, (2 December 2009) at 809 (Mike Currie, Doug Currie)

I. BACKGROUND

[1] An applicant ("the Applicant") was interviewed for an investigation into a complaint at the Queen Elizabeth Hospital. He made a request to Health PEI ("the Public Body") for access to a secondary report about systemic issues.

[2] The Public Body decided to refuse to disclose to the Applicant the requested record which it describes as a quality improvement report. Disclosure of quality improvement information is restricted by the *Health Services Act*, RSPEI 1988, c. H-1.6, section 30.

[3] The Applicant requested that the Commissioner review the Public Body's decision. The Commissioner asked the Public Body for a copy of the responsive record to assess whether it is quality improvement information. The Commissioner had not issued a Notice to Produce, an order compelling the Public Body to provide a copy of the record. The Public Body objected to producing the record to the Commissioner, claiming that the *Health Services Act* prohibits disclosure, including disclosure to the Commissioner to review the Public Body's decision.

[4] I decided to consider and make an interim decision, on the issue of whether the Public Body is required to provide a copy of the responsive record to the Information and Privacy Commissioner.

II. RECORD AT ISSUE

[5] The record at issue is described by the Public Body as a quality improvement report, and described by the Applicant as a systemic review report. The author was not a member of a quality improvement committee. The author was an external investigator on another investigation. The external investigator raised some systemic concerns, so the public body created a quality improvement committee to receive a report from the external investigator. The report to the quality improvement committee will be referred to throughout this Order as "the Record at Issue".

III. ISSUES

[6] The main issue to be determined in this review is:

> Has the Public Body properly assessed that the Applicant has no right of access to the Record at Issue pursuant to section 30 of the *Health Services Act*?

[7] The interim issue before me is:

> Does the Information and Privacy Commissioner have the authority to order production of records, for his or her independent review, where the Public Body alleges that the records or parts of the records fall within the scope of section 30 of the *Health Services Act*?

IV. ANALYSIS OF THE INTERIM ISSUE

[8] The Public Body relies on subsection 5(2) of the *Freedom of Information and Protection of Privacy Act ("the FOIPP Act")*. A provision in one piece of legislation sometimes overlaps, conflicts, or is inconsistent, with another law. The legislators may anticipate that the two laws cannot stand together, and include a provision in one or the other law that establishes a hierarchy between the two, declaring that one prevails over the other. If one law "prevails", it means that it overrules the other. Section 5 of the *FOIPP Act* states:

> 5. (2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act; or
>
> (b) a regulation under this Act
>
> expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[9] Pursuant to section 53 of the *FOIPP Act*, set out in detail at paragraph [16] below, the Information and Privacy Commissioner may require a record to be produced for examination.

[10] Part IV of the *Health Services Act* is entitled "Quality Improvement and Apologies", and sections 28 and 30 state that they prevail over the *FOIPP Act*:

> 28. (1) Notwithstanding any other Act or its regulations, including the Freedom of Information and Protection of Privacy Act, a person may disclose any information, including personal information, to a quality improvement committee for the purpose of a quality improvement activity.
>
> (2) No person shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage another person for disclosing information under subsection (1).
>
> . . .
>
> 30. Notwithstanding the Freedom of Information and Protection of Privacy Act, no person has a right of access to quality improvement information, regardless of whether it includes personal information about the person.

[11] The Public Body claims that the *Health Services Act* prevails, and the Commissioner has no jurisdiction to review its decision to decide to not disclose quality improvement information. I agree that the right of access to information, as set out in the *FOIPP Act*, does not include the right of access to quality improvement information. This was addressed in a previous order of this office, RI-15-002, *Re Health PEI* (PE IPC). In that Order, at page 3, former Commissioner MacDonald stated that the Commissioner must ensure that the records at issue contain quality improvement information to determine whether section 30 of the *Health Services Act* applies.

> An objective reading of the notwithstanding provision in the *Health Services Act* is that the Legislature intended the right of access to information, as set out in the *FOIPP Act*, not include the right of access to quality improvement information. Beyond ensuring that the records at issue are quality improvement information, which I herein confirm, I do not have the jurisdiction under the *FOIPP Act* to review the Public Body's decision to withhold quality improvement information from the Applicant. [my emphasis added]

[12] The Applicant submits that, although section 30 of the *Health Services Act* limits access to quality improvement information, it does not expressly exclude the authority of the Commissioner from reviewing the claim that the information is in fact quality improvement information. Further, the Applicant points out that the exclusion only

arises in the case of quality improvement information. It is the Applicant's position that the Record at Issue is not quality improvement information.

[13] The Applicant submits that there is a necessity in a Commissioner's review, for objective oversight, as follows:

> In this case, the public body generated the documentation and is now asserting the documentation is not disclosable, even for the purpose of review by the Office of the Privacy Commissioner. The public body is suggesting that there should be no mechanism for objective oversight. I would suggest that the provisions of the *FOIPP* authorize the Commissioner to review the documentation, particularly in a situation such as this where there is a co-mingling of two processes involving the same investigation and the same expert consultant. Even if some of the documentation is properly classified as quality improvement information, clearly none of the facts upon which [the author] relies were subject to the same protection. The public body's assertion that none of the information is disclosable is an apparent failure in its ability to objectively review the information fairly and in accordance with the provisions of the legislation.

[14] The Applicant further states that, if the Commissioner has doubts regarding whether the information contained in the Record at Issue is either in whole, or in part, quality improvement information, the Commissioner should review the Record at Issue to determine whether the information meets the requirements of the *Health Services Act.*

[15] The Public Body referred to decisions from other jurisdictions about whether the Commissioner can order production of responsive records to determine whether they fall within the Commissioner's jurisdiction. The Public Body submits that, while early decisions may have accepted the Commissioner's authority to require production of any record, more recent decisions have begun to limit this authority. In *Ontario (Minister of Health)* v. *Canoe,* 1995 CarswellOnt 3311, the Ontario Court of Appeal accepted that the Commissioner can require the production of records otherwise excluded by Ontario's

access to information legislation. More recently, in *British Columbia (Information and Privacy Commissioner)* v. *British Columbia (Police Complaint Commissioner),* 2015 BCSC 1538, the Police Complaint Commissioner asked the courts to judicially review the BC Information and Privacy Commissioner's Order to produce records pursuant to subsection 44(3) of BC's *Freedom of Information and Protection of Privacy Act* ("B.C.'s FIPPA"). The British Columbia Supreme Court did not follow the *Canoe, supra,* decision.

[16] The *Police Complaint Commissioner* decision of the British Columbia Supreme Court is distinguishable, based on differences in statutory language. The PEI *FOIPP Act* expressly states that the Commissioner may examine any information, whether or not the record is subject to the *FOIPP Act*. As noted above, section 53(1)-(3) of the PEI *FOIPP Act* states:

> 53. (1) In conducting an investigation under clause 50(1)(a) or an inquiry under section 64 or in giving advice and recommendations under section 51, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act R.S.P.E.I. 1988, Cap. P-31 and the powers given by subsection (2).
>
> (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information <u>whether or not the record is subject to the provisions of this Act</u>. [underline emphasis added]
>
> (3) Despite any other enactment or any privilege of the law of evidence, a Public Body shall produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

[17] B.C.'s *FIPPA* does not have a clause similar to subsection 53(2) of the *FOIPP Act*, which is why the B.C. Supreme Court distinguished the Ontario *Canoe* decisions (at paragraph [127]). B.C.'s *FIPPA* states, at section 44:

44 (1) *For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section* 56, *the commissioner may make an order requiring a person to do either or both of the following:*

(a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a Public Body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1). [emphasis added]

[18] In a recent Supreme Court of Canada decision relating to solicitor-client privilege, *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), at paragraph 61, Justice Côté for the majority confirmed that the B.C. Information and Privacy Commissioner is not given broad legislative powers, under section 44 above, to compel the production of records.

[19] The Public Body relies upon a decision from the Alberta Court of Appeal, *University of Calgary* v *R(J),* 2015 ABCA 118, (recently confirmed by the Supreme Court of Canada, cited above). The courts held that Alberta's equivalent of our *FOIPP Act*, section 53(3), is not sufficient to provide the Commissioner authority to compel production of solicitor-client privileged information. In my view, the *University of Calgary, supra*, decision is

distinguishable. It is an analysis of subsection 53(3) as it relates to solicitor-client privileged records. The Supreme Court of Canada states that solicitor-client privilege is no longer merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of our legal system. In contrast, the cited prevailing clause of the *Health Services Act*, section 30, is merely a legislated limit on the right of access to information set out in the *FOIPP Act*.

[20] The *FOIPP Act* explicitly authorizes the Commissioner to compel records from a public body whether or not the record is subject to the provisions of the *FOIPP Act*. I do not accept the submission of the Public Body that section 30 prohibits the Public Body from providing the record to the Commissioner to examine. Section 30 is referring to the right of access of an applicant generally described under section 2 [purpose of the *FOIPP Act*] and section 6 [information rights], not the Commissioner's power to examine under section 53(2) of the *FOIPP Act*. There is no conflict between these two provisions, section 30 of the *Health Services Act*, and section 53(2) of the *FOIPP Act*. To further demonstrate the legislative intention, I also refer to the Hansard transcript of the discussion preceding the passing of the relevant amendments to the *Health Services Act.* At page 809, an honourable member asked the Minister, "This act will stall fall under the conflict of – no, not the conflict of interest, but the freedom of information officer?". The Minister responded in the affirmative (Prince Edward Island, Legislative Assembly, *Hansard*, 63rd Leg, 3rd Sess, (2 December 2009) at 809 (Mike Currie, Doug Currie)).

[21] Although not cited by the Public Body, I also considered section 29 of the *Health Services Act*, which states:

> 29. (1) No person shall be compellable to produce or disclose quality improvement information in any legal proceeding.

(2) Quality improvement information is not admissible in evidence in a legal proceeding.

[22] The expressions “legal proceeding” and “quality improvement information” and related terms are defined in the *Health Services Act*, at section 26;

26. for the purposes of this part,

. . .

(c) “legal proceeding” means an inquiry, arbitration, inquest, hearing or civil proceeding in which evidence is or may be given before a court, tribunal, commission, board, committee, coroner or arbitrator, and includes an action or proceeding for the imposition of punishment by fine, penalty or imprisonment for the violation of a provincial enactment, but does not include any activities carried on by a quality improvement committee or a proceeding regarding an offence under subsection 31(1);

. . .

(e) “quality improvement activity” means a planned or systematic activity, the purpose of which is to assess, investigate, evaluate or make recommendations respecting the provision of health services by the Minister or Health PEI, with a view to maintaining or improving the quality of such health services;

(f) “quality improvement committee” means a committee established or designated under subsection 27(1);

(g) “quality improvement information” means information in any form that is communicated for the purpose of, or created in the course of, carrying out a quality improvement activity, but does not include

(i) information contained in a record, such as a hospital chart or a medical record, that is maintained for the purpose of providing health services to an individual,

(ii) facts contained in a record of an incident involving the provision of health services to an individual,

(iii) the fact that a quality improvement committee met or conducted a quality improvement activity,

(iv) the terms of reference of a quality improvement committee, or

(v) an accreditation report issued by Accreditation Canada.

[23] An inquiry by the Information and Privacy Commissioner is a legal proceeding. On this basis, there is a conflict between section 29 of the *Health Services Act* and section 53 of the *FOIPP Act*. The *Health Services Act* states that quality improvement information is not compellable in a legal proceeding, and the *FOIPP Act* states that the Commissioner may examine any record. Under section 5 of the *FOIPP Act,* when there is a conflict between a provision of another enactment and a provision of the *FOIPP Act*, the provision of the *FOIPP Act* prevails unless the other Act expressly provides that the other provision prevails despite the *FOIPP Act*. The Legislature expressly provided that sections 28 and 30 of the *Health Services Act* prevail despite the *FOIPP Act*, but it did not expressly state that section 29 prevails over the *FOIPP Act.* Therefore, section 53 of the *FOIPP Act* prevails over section 29 of the *Health Services Act*. The prevailing law is that the Commissioner may require any record to be produced, and may examine any information in a record.

[24] The Public Body makes an alternative submission that the Commissioner can determine whether the records contain quality improvement information without reviewing the Record at Issue.

> Further, and in the alternative, Health PEI submits that a review of the substance of the Systemic Report is unnecessary to determine the status of the Report as QI Information. The provisions of the *Health Services Act* make it clear that information is not characterized as QI Information due to its substance. QI Information is characterized as such because it was communicated for the purpose of, or created in the course of, carrying out a QIA. As we will demonstrate below, the Systemic Report falls squarely within that purpose, and the substance of the Systemic Report is not required to make this threshold determination.

[25] I received and reviewed submissions of the Public Body and am persuaded that a quality improvement activity occurred, but I am not able to assess whether the content of the Record at Issue is only quality improvement information. The *Health Services Act*

definition of quality improvement information expressly excludes certain information under section 26(g). I require the production of the Record at Issue, not only to determine whether it satisfies the definition of quality improvement information, but also to confirm whether any information in the Record at Issue falls under the exclusions.

[26] Based on my review of the *FOIPP Act*, and the *Health Services Act*, I find that the Information and Privacy Commissioner has the authority to order production of records, for his or her independent review, where the Public Body alleges that the records or parts of the records fall within the scope of section 30 of the *Health Services Act*. Therefore, I have the power to compel the Public Body to produce the Record at Issue. I remind the parties that, pursuant to subsection 53(5) of the *FOIPP Act*, I am required to return any record produced, upon completing my review.

[27] My finding is consistent with the stated purposes of the *FOIPP Act.* Section 2(e) of the *FOIPP Act* states that one of the purposes of the *FOIPP Act* is to provide independent reviews of decisions made by public bodies. The Legislature created an independent officer of the Legislative Assembly, the Information and Privacy Commissioner, to determine issues relating to access to information. I am required to carry out my legislated duty to independently review a public body's decision, and the Applicant has a right to my independent review.

[28] My finding also aligns with the ancillary powers provision in section 24(2) of the *Interpretation Act* :

> 24(2) Where in an enactment power is given to a person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person to do or enforce the doing of the act or thing.

V. ORDER

[29] Under subsection 53(3) of the *FOIPP Act*, I order the Public Body produce to me a complete copy of the Record at Issue for the purpose of determining the main issue of this review, whether the Public Body properly assessed that the Applicant has no right of access to the Record at Issue, pursuant to section 30 of the *Health Services Act.*

[30] I thank both parties for their well-researched submissions relating to the interim issue in this review. I believe that the Public Body has taken this position in good faith, and I draw no adverse inference in it taking a principled position.

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Karen A. Rose
Information and Privacy Commissioner